ONG BOON SIANG & ORS. v. REGINA

[A.Cr.J. (Rose C.J.) December 8, 1960]

[Singapore — Magistrate's Appeal No. 176 of 1960]

Criminal Procedure — Recall of complainant for cross-examination — Refusal of application for — Submission of no case to answer overruled — Silence of accused — No defence witness called — Criminal Procedure Code (Cap. 132), ss.172(j) and 440 — "Making his defence" — Question of retrial.

The appellants were charged with the offence of putting a person in fear of injury in order to commit extortion, an offence punishable under section 385 of the Penal Code. At the conclusion of the prosecution case, learned counsel for the appellants submitted that there was no case to answer against any of the three appellants. The learned District Judge rejected his submission and ruled that all the appellants had a case to answer. In the event all three elected to remain silent; no witnesses were called on behalf of the defence; but an application was made by learned counsel under section 172(j) of the Criminal Procedure Code for the recall of the complainant for cross-examination. The learned District Judge disallowed the application on the ground that it was out of time, convicted the appellants and sentenced them to 12 months' imprisonment together with six strokes of the rotan each. On appeal,

Held: (1) at the time of the application the appellants were still making their defence, and therefore it should have been treated on its merit;

(2) the fact that they elected neither to give evidence on oath nor to make an unsworn statement from the dock nor to call any witnesses on their behalf is immaterial;

(3) the defect in the proceedings of the trial Court was substantial and the convictions, therefore, could not stand.

Question of retrial considered and rejected owing to the quality of evidence adduced.

MAGISTRATE'S APPEAL.

T. T. Rajah for the appellant.

Francis T. Seow (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Rose C.J.: The three appellants were convicted of an offence against section 385 of the Penal Code.

The principal ground of appeal is that the learned District Judge erred in law when he refused an application made on behalf of the appellants for the recall, for the purposes of cross-examination, of the complainant.

At the conclusion of the prosecution case learned counsel for the appellants submitted that there was no case to answer against any of the three accused. Upon his submission being overruled he embarked upon the defence. In the event all three accused elected to remain silent; no witnesses were called on behalf of the defence; but an application was made by learned counsel under section 172(j) of the Criminal Procedure Code for the recall of the complainant for cross-examination.

The sub-section reads as follows:

" (j) if the accused does not plead guilty to the charge as amended or if no amendment is made, the accused shall then be called upon to enter upon his defence and to produce his evidence and shall, at any time while he is making his defence, be allowed to recall and cross-examine any witness present in the court or its precincts."

The learned District Judge made the following order, appearing on page 8 of the record:—

"Order: As all the accused elected to remain silent and accused are not calling their own witnesses application is disallowed."

With all respect it seems to me that the learned District Judge misapprehended the position under the sub-section. The question which has to be determined is whether the defendants were still "making their defence." If they were, then the fact that they elected neither to give evidence on oath nor to make an unsworn statement from the dock nor to call any witnesses on their behalf is immaterial.

In the present case it cannot, in my view, be seriously disputed that the appellants were still making their defence at the time of the application. The application, therefore, should have been treated on its merits. Presumably, in some cases, a Judge would be entitled to take the view that the application was frivolous or vexatious and might therefore properly be refused. The learned District Judge, however, did not purport to disallow the application on the ground that it was frivolous or vexatious, but on the ground that it was out of time.

Learned Crown counsel has suggested that in the present case no miscarriage of justice in fact occurred and that therefore the Crown is entitled to avail itself of section 440 of the Criminal Procedure Code. I am, however, reluctant to fall back on that escape provision in a case such as the present. Sitting here on appeal it is very difficult, on the material available, to come to a definite conclusion whether or not a further cross-examination of the complainant would have yielded matters which could have materially assisted the defence. It might have done, or it might not. That being so, I am not disposed to invoke that section.

In the circumstances I regard the defect in the proceedings of the trial Court as substantial and the convictions, therefore, in my opinion, cannot stand.

I have anxiously considered whether I should order a retrial. Having regard, however, to the quality of the evidence so far adduced, and to the fact that all the appellants were of previous good character and have been remanded in custody for some months, I am of opinion that justice will be done if the appeal is allowed and the convictions and sentences set aside. And I so direct.

Appeal allowed.